



In the Matter of:

**UNITED KLEENIST ORGANIZATION  
CORP. and YOUNG PARK,**

**Petitioners.**

**ARB CASE NO. 00-042**

**ALJ CASE NO. 1999-SCA-18**

**DATE: January 25, 2002**

Re: Dispute concerning payment of prevailing wages, fringe benefits and overtime pay, and debarment for labor standards violations with respect to DOT Contract No. DTFA09-95-C-25005.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD<sup>1/</sup>

**Appearances:**

*For the Petitioner:*

Scott A. Lathrop, Esq., Groton, Massachusetts

*For the Wage and Hour Administrator:*

Carol Arnold, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., U.S. Department of Labor, Washington, D.C.

**FINAL DECISION AND ORDER**

This case involves allegations that a federal service contractor, United Kleenist Organization Corp. (Kleenist), and its President, Young Park (Park) violated the minimum wage, fringe benefit and recordkeeping provisions of the McNamara-O'Hara Service Contract Act of 1965, as amended, 42 U.S.C.A. §351 *et seq.* (West 1994)(SCA) and its implementing regulations, as well as the overtime pay requirements of the Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C.A. §§327-33 (West 2000)(CWHSSA). In a Decision and Order (D&O) issued January 10, 2000, a Labor Department Administrative Law Judge (ALJ) determined that Kleenist and Park (collectively, "Petitioners") had violated these laws. The ALJ ordered that Kleenist and Park be debarred and listed as ineligible for future government contracts for a period of three years and that they pay \$21,631.50 in back wages to the Department of Labor, to be distributed to the underpaid workers. Petitioners have filed this appeal. We affirm.

---

<sup>1/</sup> This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

## BACKGROUND

Kleenist provides janitorial services to its customers primarily in Massachusetts. Petitioner Young Park is the president of Kleenist and, for all relevant time periods, was responsible for the employment and management practices of the company. On January 4, 1995, Kleenist entered into a contract for the performance of janitorial services at a Federal Aviation Administration (“FAA”) facility located in Olathe, Kansas. The contract was subject to both the SCA and CWHSSA. The applicable wage determination, which was incorporated into the contract, mandated that janitorial employees be paid wages no less than \$7.17 per hour plus \$.90 per hour in fringe benefits. Under the wage determination, fringe benefits also were to include holiday pay for ten federal holidays and a two-week vacation after one year of employment. Tr. 200-201.

Randy Kim worked for Kleenist as a janitor at the FAA facility. Because Park lived in Massachusetts, he delegated to Kim the responsibility for recording the work hours of his co-workers at the FAA facility and forwarding that information to Kleenist’s bookkeeper, Kay Park, who was located in Gower, Missouri.<sup>2/</sup> Petitioners characterize the information that Kim forwarded to Kay Park as “payroll summaries.”

In June 1996, the Wage and Hour Division began an investigation into Kleenist’s performance on the FAA contract. According to investigator Michelle Wilson, Kleenist was less than cooperative. Wilson testified that, in order to obtain Kleenist’s payroll information, she drove from her office in Kansas City, Kansas, to Gower, Missouri, about a hour and a half away. When Wilson arrived, Kay Park gave her the payroll summaries prepared by Kim and told her that they were Kleenist’s payroll records. Wilson was unable to obtain the time cards because Kay Park said they were unavailable. Tr. 206.

When Wilson returned to her office, she discovered that the payroll summaries were incomplete. In some cases, the records reflected the hours the employees worked but not the gross amounts they earned, and in other cases it was just the opposite. Wilson determined that she needed the time cards to “get a full picture,” so she contacted Kay Park and made an appointment to pick them up. Tr. 207-209.

The day before Wilson was to pick up the time cards, she telephoned Kay Park to confirm that the cards would be available. Kay Park assured her that the cards were ready to be picked up. However, when Wilson arrived at Kleenist’s office, she was greeted by Young Park. He told her that the cards were not available and turned her away without explanation. Later that same day, Young Park called Wilson and informed her that the time cards were ready to be picked up. However, when Wilson declined to drive back to Gower, Park delivered the time cards to her two days later. Tr. 209-210, 245. Once again, Wilson found that the payroll information was incomplete so she drove back to Gower and picked up additional material from Kay Park. However, when she examined the material, she discovered that it did not include all of the time cards. Tr. 211-212.

According to Wilson, Kleenist’s records were “highly” substandard. Specifically, she testified:

---

<sup>2/</sup> Young Park and Kay Park are not related. Tr. 71.

Several of the employees had been paid on some type of a salary that didn't cover all hours worked to the regular rate, meaning that money that they paid, if I would divide the hours that they worked into gross amounts that they were paid, it did not equal the regular rate of \$7.17 an hour that was required. The employer had not paid in separately stated health and welfare benefits. The employer had not paid vacation pay. And only in one instance could I find that the employer had ever paid holiday pay . . . There were deductions made clearly on the payrolls, and absolutely no documentation as to why . . . Full names were not kept. Total remuneration was not kept accurately. You couldn't tell, in many instances, what the rates of pay were.<sup>3/</sup>

Tr. 213, 215.

Nevertheless, Wilson completed her computations using the information available and concluded that Kleenist owed back wages. She then met with Park, explained why his company owed back wages, and requested that he pay them. Park denied violating any laws and refused to pay anything. Tr. 216.

On May 20, 1999, the Administrator filed a complaint against Petitioners alleging that they had failed to pay the wages and benefits required by the SCA, had failed to pay overtime wages as required by CWHSSA, and had failed to keep adequate records as required by the Department's regulations. In the complaint, the Administrator sought an order debarring Petitioners for three years and directing them to pay \$25,631.50 in back wages and benefits. Petitioners denied the allegations against them.

The ALJ reviewed this matter consistent with the burden-shifting methodology set forth in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). Under this standard,

[The employee] bears the burden of proving that he performed work for which he was not compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty . . . to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy . . . . When the employer has kept

---

<sup>3/</sup> Department regulations require every contractor performing work subject to the SCA to keep payroll records for three years from the completion of the work and to make those records available to authorized representatives of the Wage and Hour Division. Among other things, those records must include the number of daily and weekly hours worked by each employee and any deductions, rebates, or refunds from the total daily or weekly compensation of each employee. *See* 29 C.F.R. §4.6 (g)(1)(2000).

proper and accurate records the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises . . . . In such a situation, we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

328 U.S. at 687-688.<sup>4/</sup>

In this case, several employees testified about the hours for which they were not compensated and the fringe benefits that they did not receive. Because the payroll records were not complete, the Wage and Hour investigator testified as to how she reconstructed the payroll records based on interviews with the employees and the information provided by Kleenist. The burden then shifted to Petitioners to either come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the Administrator's evidence. Petitioners attempted to rebut that evidence with their own analysis of the payroll information, but the ALJ found this evidence unpersuasive, reasoning as follows:

During cross-examination of Mr. Young Park, and the wage records he created for the hearing, it became clear that the after-the-fact compilation of hours and wages were entirely inconsistent. Paychecks issued to employees often did not match Mr. Park's figures of the wages owed. Additionally, if there was an inconsistency with the earlier records provided by Mr. Park to Ms. Wilson, Mr. Park would simply allege "time card fraud." Also, Mr. Park relied upon an assertion that it was policy to withhold the first two weeks of pay from an employee's check, yet the amounts withheld rarely, if ever, equaled the appropriate amount the employee should have been paid for the two week period in question.

D&O at 11.

---

<sup>4/</sup> Although *Anderson* involved back wage awards under the Fair Labor Standards Act, the logic and reasoning underlying the *Anderson* standard is equally applicable to awards under the SCA and CWHSSA. See generally *American Waste Removal Company v. Donovan*, 748 F.2d 1406 (10th 1984) Because this is an enforcement action brought by the Wage and Hour Administrator, the initial burden of proving that wages have been underpaid falls to the Administrator. See, e.g., *Thomas & Sons Building Contractors, Inc.*, Order Denying Reconsideration, ARB No. 00-050, ALJ No. 96-DBA-37 (ARB Dec. 6, 2001).

The ALJ found that Kleenist had violated the SCA, CWHSSA, and the Department's regulations. However, he determined that \$4,000 of the requested back pay award was unrecoverable in this action.<sup>5/</sup> Accordingly, the ALJ reduced the assessment and ordered Petitioners to pay \$21,631.50. As for debarment, the ALJ noted that persons violating the SCA are ineligible for an award of government contracts for a period of three years unless the penalty is relieved due to unusual circumstances. Finding no such unusual circumstances in this case, the ALJ ordered that Petitioners be debarred. This appeal followed.

## **JURISDICTION**

The Board has jurisdiction over this appeal pursuant to the SCA, CWHSSA, and 29 C.F.R. §8.1 (2000).

## **STANDARD OF REVIEW**

The Board's review of an ALJ's decision is in the nature of an appellate proceeding. 29 C.F.R. §8.1(d). Pursuant to 29 C.F.R. §8.9 (b), the Board shall modify and set aside an ALJ's findings of fact only when it determines that those findings are not supported by a "preponderance of the evidence." Conclusions of law are reviewed *de novo*.

## **DISCUSSION**

### **I. Reliance on the Payroll Records**

In determining that Petitioners violated the applicable statutes, the ALJ relied upon the payroll summaries that were prepared by Kim and presented to Wilson as Kleenist's payroll records. Because the time cards were also part of the evidence in this case, and because Wilson testified that the payroll summaries were "highly" substandard, Petitioners argue that it was prejudicial error for the ALJ to rely on the payroll summaries rather than the time cards. Petition for Review (Petition) at 4. We disagree.

Wilson explained the respective roles that time cards and payroll records play in an investigation, observing that Wage and Hour's investigators rely on the employer's representation that the payroll records are accurate and use time cards only as a means to spot check or to fill gaps in the payroll records. Tr. 207-208, 219, 257, 261. Petitioners do not allege that Wilson failed to adhere to this practice, nor do they challenge the reasonableness of the practice itself. Rather, they direct our attention to the following excerpt from the cross-examination of Wilson:

Petitioners' attorney: Okay. Now will you agree with me that even though it may not be your standard practice, but that in a case where you have highly *suspect* payroll records, the ultimate analysis,

---

<sup>5/</sup> The Administrator had assessed Petitioners \$4,000 for unpaid salary owed to Randy Kim. However, the ALJ declined to address this issue because it involved "salary owed outside the time of the investigation." D&O at 12. This aspect of the ALJ's decision was not appealed by the Administrator.

whether you're prepared to do it or not, is the best analysis as to hours worked and wages paid would be looking at the time cards.

Ms. Wilson: Absolutely.

Tr. 267 (emphasis added). Based on this testimony, Petitioners urge us to conclude that the ALJ erred in relying on the payroll summaries. Petition at 4. There are several problems with this argument.

First, Petitioners have never disputed that Wilson followed standard DOL practice, nor have they argued that the standard practice itself is inconsistent with law or regulation. Absent a direct challenge to the validity of the Administrator's practice, Wilson's speculation as to what might be appropriate under some other practice is totally irrelevant.

Second, Wilson's testimony on the use of time cards is, at best, ambiguous. In answer to the above hypothetical, Wilson agreed that it would be better to use the time cards in cases where there are highly "suspect" payroll records. This question was posed as a followup to Wilson's testimony that she found the Petitioners' payroll records "highly substandard." However, contrary to Petitioners' implicit assumption, the words "suspect" and "substandard" are not synonymous. Substandard means "deviating from or falling short of a standard or norm." Suspect means "regarded or deserving to be regarded with suspicion." Webster's Ninth New Collegiate Dictionary (1984). There is nothing in the record of this case to suggest that Wilson found the payroll records suspicious. In fact, Wilson testified that she had no reason to doubt the validity of either the payroll summaries or the time cards. Tr. 258.

Finally, Petitioners' argument is premised on the assumption that, with regard to the number of hours worked, the time cards are either more accurate than the payroll summaries or that they contain significantly different information. These assumptions are not only inconsistent with the testimony but also with one of the theories on which Petitioners themselves argued their case. In their opening statement, Petitioners claimed that Kim "doctored" the time cards. Tr. 16. We fail to see how the time cards that the Petitioners characterize as "doctored" are any more reliable than the payroll summaries that Kim prepared. Moreover, the testimony does not reflect that the time cards and payroll records contained significantly different information. Wilson testified that she spot checked the payroll records against the time cards and found that they were "pretty much the same." Tr. 258, 272.

## **II. Fringe Benefits**

### **A. Meaning of the Applicable Regulation**

The SCA regulations at 29 C.F.R. §4.170(a) require contractors and subcontractors to furnish fringe benefits separate from, and in addition to, monetary wages. Petitioners, however, argue that this requirement is inapplicable to them unless the requirement is prescribed in the contract itself. Specifically, Petitioners state:

Section §4.170(a) of 29 C.F.R. provides that the fringe benefits “shall be furnished, separate from and in addition to the specified monetary wages, [by the contractor or subcontractor to the employees engaged in performance of the contract] as specified in the determination of the Secretary or his authorized representative and prescribed in the contract documents.” The contract documents provided to [Kleenist] did not prescribe that its fringe benefits had to be furnished “separate from” the specified monetary wages. Therefore, it cannot be said that [Kleenist] was required to do such.

Petition at 8 (emphasis in original).

This argument is clearly based on a misreading of the regulation. The phrase “as specified in the determination of the Secretary or his authorized representative and prescribed in the contract documents” does not modify the words “separate from.” It simply requires that the amount of fringe benefits shall be as specified in the determination of the Secretary or his authorized representative and prescribed in the contract documents. It does not mean that the contract itself has to specify that the fringe benefits must be paid separately. This interpretation is supported by the grammatical structure of the sentence itself. The phrase “separate from and in addition to the specified monetary wages” is set off by commas and, as a result, stands independent of the language that follows. *See U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

### **B. Fringe Benefit Payments Allegedly Included in the Hourly Wage**

In the proceedings below, Petitioners asserted that the money they were required to pay for fringe benefits was included in the hourly wage paid to their employees, thus explaining why employees were paid \$10 an hour instead of \$7.17, the minimum hourly rate required under the applicable wage determination.<sup>6/</sup> The ALJ rejected this argument as specious, in part, because he found it “unlikely that [Petitioners] would pay vacation and holiday pay in advance since an employee might not work long enough to earn vacation or might not work on the particular holiday for which they were being paid.” D&O at 9.

Petitioners take issue with the ALJ’s reasoning and argue as follows:

It is undisputed that in 1995, during the first year of [Kleenist’s] very first contract, it paid all its employees at the rate of \$10.00 per hour. Park testified that this hourly rate of \$10.00 per hour was intended to cover the employees’ base rate of \$7.17 per hour and their fringe benefits. Regarding holiday pay, Kim, who was called as a DOL witness, testified that [Kleenist] began separately paying holiday pay sometime before July, 1995. Therefore [Kleenist] did not pay holiday

---

<sup>6/</sup> If the \$10.00 hourly rate did not include fringe benefits, then it raises a question as to why Petitioners would pay their employees above the required \$7.17 hourly rate. A possible answer was provided by Wilson who testified that one of Kleenist’s employees told her that the market rate for janitorial work in the area was \$10.00 an hour and that employees would not work for less. Tr. 287.

pay in advance; holiday pay was not part of the fringe benefits that was added to the base rate. With regard to vacation pay, as it occurred, only Kim worked long enough for [Kleenist] to earn any vacation, and he was paid on a salary basis. . . . Hence, it was not a “specious” argument for the Respondents to contend that the health and welfare benefits were included within the \$10.00 per hour paid to [Kleenist] employees.

Petition at 7 (citations omitted).

We agree with the Petitioners that the ALJ’s analysis on this point is somewhat confused, conflating the holiday and vacation fringe benefit with the hourly fringe benefit rate that typically is used to purchase health insurance. However, the ALJ’s ultimate conclusion – *i.e.*, that proper fringe benefits were not paid to the employees – plainly is correct.

Petitioners concede that an “employer cannot offset an amount of monetary wages paid in excess of the [required] wages . . . in order to satisfy his fringe benefit obligations.” Petition at 8. Instead, they assert that Kleenist “specifically paid in excess of the \$7.17 per hour minimum rate for the purpose of meeting its obligations under the contract documents, and it only seeks now credit for the payments made to meet such fringe benefit obligations.” *Id.*

The Administrator responds as follows:

While it is true that 29 C.F.R. 4.170 permits payment of fringe benefits in cash, “[u]nless the employees were informed that fringe benefits were included in their pay and understood this fact, the existence of wages above minimum cannot be considered the provision of required fringe benefits.” *Crist Trucking Inc.*, SCA-1275 (Nov. 23, 1983). Moreover, an employer “must keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits.” 29 C.F.R. 4.170(a). Previous decisions on administrative review under the SCA have consistently held that when an employer has not made any provision for fringe benefits, “overpaid” wages cannot be credited against an employer’s fringe benefit obligation. [citations omitted]. As noted above, the testimony here indicates that [Kleenist’s] employees were not informed that fringe benefits were included in their pay.

Adm. Opp. to Pet. for Rev. at 10-11. Petitioners have not filed a reply brief taking issue with either the Administrator’s citation of the relevant authorities or the Administrator’s application of the law to the facts of this case. Quite simply, to the extent that Petitioners now claim that they intentionally paid a higher-than-minimum wage rate to its workers in order to satisfy the fringe benefit requirements, there is nothing in the record suggesting that it maintained records documenting such a policy. In the absence of rebuttal, we can only conclude that Petitioners have conceded the point.

With specific regard to the requirement that employees on the contract be paid for ten paid holidays, the ALJ noted Kim’s testimony that only when one employee complained that she was not paid for a holiday was she provided with additional compensation – a payment which was corroborated by the payroll records. This evidence strongly supports the ALJ’s view that Petitioners’ claim to have included the fringe benefit payments as part of the hourly wage was false, because if Petitioners believed that they *already* were compensating their workers for holiday pay, it is unlikely that they would have made a second holiday payment to a worker merely upon demand.<sup>7/</sup>

### III. Overtime Computations

The ALJ found that “[t]here is simply no evidence upon which to support a finding that [Petitioners] paid employees wages equal to time and a half their normal hourly rate” for hours worked in excess of a forty hour week. D&O at 10. Petitioners take issue with the ALJ’s finding and state:

Under the Contract Work Hours and Safety [Standards] Act (40 U.S.C. § 328 et seq.) overtime premiums must be provided to employees covered under that Act. Under 29 C.F.R. § 4.166 employees “may be paid on a daily, weekly, or other time basis, by piece or task rates, so long as the measure of work and compensation used, when translated or reduced by computation to an hourly basis each workweek, will provide a rate per hour that will fulfill the statutory requirement.” Based on the foregoing and [Petitioners’] Exhibit 1, all [Kleenist] employees received all moneys owing them.<sup>8/</sup>

Petition at 9-10 (emphasis in original).<sup>9/</sup>

The language quoted above constitutes the totality of Petitioners’ argument on this point. All Petitioners have done is recite the language of the statute, reference their reconstructed payroll records, and conclude that they owe no money to their employees. Such statements, unaccompanied by a legal argument, clearly are insufficient to show that the ALJ’s decision regarding the overtime

---

<sup>7/</sup> Petitioners also suggest that they did not have to pay for vacations because none of their employees had worked long enough to take one. Although Park testified that he did not recall anyone other than Kim who had worked for him longer than a year, this line of questioning was never developed into an argument. Tr. 298. We decline to address this argument absent a showing that it could not have been raised below.

<sup>8/</sup> Petitioners’ Exhibit 1 is the reconstructed payroll record that Petitioners prepared for the hearing.

<sup>9/</sup> Petitioners also complain that the ALJ erred in relying on Kim’s payroll summaries to conclude that it failed to pay overtime compensation to its employees. Presumably, Petitioners are again arguing that the ALJ should have relied on the time cards instead of the payroll summaries. For the reasons stated earlier in this decision, Petitioners’ argument regarding reliance on the payroll summaries is without merit.

computation is erroneous as a matter of law or unsupported by a preponderance of the evidence.<sup>10/</sup>

Based on our review of the record, Petitioners failed to carry their burden of rebutting the Administrator's *prima facie* case of wage and fringe benefit underpayments and overtime violations. Therefore, the Administrator's evidence and testimony constitute ample evidence to support the ALJ's finding with regard to the wages and benefits owed to the employees in question. The only issue remaining is whether Petitioners are entitled to be relieved from debarment under the SCA.

#### **IV. Debarment**

The Administrator seeks to debar Kleenist and Park for violations of the SCA. Under Section 5(a), of the SCA, any person or firm found by the Secretary of Labor to have violated the Act shall be ineligible to receive Federal contracts for a period of three years from the date of listing by the Comptroller General "[u]nless the Secretary otherwise recommends because of unusual circumstances." 41 U.S.C.A. §354(a). Debarment is assumed once violations of the Act have been found, unless the violator is able to show the existence of "unusual circumstances" that warrant relief from the SCA's debarment sanction. 29 C.F.R. §4.188(a) and (b); *Hugo Reforestation, Inc.*, ARB No. 99-003, ALJ No. 97-SCA-20 (ARB Apr. 30, 2001).

As has been noted on many occasions, "Section 5(a) is a particularly unforgiving provision of a demanding statute. A contractor seeking an 'unusual circumstances' exemption from debarment must, therefore, run a narrow gauntlet." *Sharipoff dba BSA Co.*, No. 88-SCA-32, slip op. at 6 (Sec'y Sept. 20, 1991). *Accord Colorado Security Agency*, No. 85-SCA-53, slip op. at 2-3 (Sec'y July 5, 1991); *Able Building Maintenance & Serv. Co.*, No. 85-SCA-4 (Dep. Sec.'y Feb. 27, 1991); *A to Z Maintenance Corp. v. Dole*, 710 F.Supp. 853, 855-856 (D.D.C. 1989). "The legislative history of the SCA makes clear that debarment of a contractor who violated the SCA should be the norm, not the exception, and only the most compelling of justifications should relieve a violating contractor from that sanction." *Vigilantes v. Administrator of Wage and Hour Div.*, 968 F.2d 1412, 1418 (1st Cir. 1992).

The SCA does not define "unusual circumstances." However, DOL regulations establish a three-part test which sets forth the criteria for determining when relief from debarment is appropriate. *See* 29 C.F.R. §1.188(b). Under Part I of this test, the contractor must establish that the conduct giving rise to the SCA violations was neither willful, deliberate, nor of an aggravated nature, and that the violations were not the result of culpable conduct. Moreover, the contractor must demonstrate the absence of a history of similar violations, an absence of repeat violations of the SCA and, to the extent that the contractor has violated the SCA in the past, that such violation was not serious in nature. Under Part II, the contractor must demonstrate a good compliance history, cooperation in the investigation, repayment of the moneys due, and sufficient assurances of future compliance. Under Part III, there are a number of other factors that must be considered including, *inter alia*, whether the contractor has previously been investigated for violations of the SCA, whether

---

<sup>10/</sup> In connection with its argument on overtime compensation, Petitioners note that Kim was paid a flat rate of \$2,000 a month and that, based on their calculations, this wage included all pay and benefits to which he was entitled. Petition at n. 3. This argument not only ignores Kim's testimony that he was never paid for overtime but also ignores the fact that the ALJ found his testimony credible. Tr. 129, D&O at 10.

the contractor has committed recordkeeping violations which impeded the Department's investigation, and whether the determination of liability under the Act was dependent upon the resolution of *bona fide* legal issues of doubtful certainty. A contractor must meet all three parts of the test in order to be relieved from debarment. *See Hugo Reforestation, supra.*

As a basis for relief from debarment, Petitioners state:

If there were any violations of Service Contract Act, they were at most record keeping violations . . . . If there were any record keeping violations, they were not willful, deliberate or of an aggravated nature or the result of culpable conduct. [Kleenist] otherwise has a good compliance history. Once [Kleenist] was informed of the way that the Department of Labor wanted it to keep its records and make its methods of payments [sic], it has complied. Furthermore Park is Korean and English is not his native tongue. This was the first time he operated a payroll, and the contracting officer never told him that he had to separately state the fringe benefits.

Petition at 11.

This argument is unpersuasive for several reasons. First, the plea that Petitioners should not be debarred because the Petitioners view their recordkeeping violations as *de minimis* or excusable erroneously assumes that they would not suffer the same sanction based on the other charges against them. This is not solely a case of recordkeeping violations, it also involves a substantial failure to pay the wages and benefits required by the SCA. Second, although English may not be Park's native tongue, this fact does not, in and of itself, establish that he lacks a proficiency in the English language or that any such lack of proficiency materially impeded his ability to comply with the SCA. *Accord, Hugo Reforestation, Inc., supra.* Finally, the regulations make clear that "unusual circumstances" do not include

those circumstances which commonly exist in cases where violations are found, such as negligent or willful disregard of the contract requirements and of the Act and regulations, including a contractor's plea of ignorance of the Act's requirements where the obligation to comply with the Act is plain from the contract, failure to keep necessary records and the like.

29 C.F.R. §4.188(b)(1).

Far from presenting unusual circumstances, this case typifies a garden variety failure to comply with the Act and applicable regulations. As such, we see no basis for concluding that Petitioners meet the criteria for relief from debarment.

## **CONCLUSION**

The Petition for Review is **DENIED**, and the ALJ's decision and order is **AFFIRMED**.

**SO ORDERED.**

**PAUL GREENBERG**

Chief Administrative Appeals Judge

**OLIVER M. TRANSUE**

Administrative Appeals Judge